

**ATTORNEYS AT LAW**

**www.dwmlaw.com**

1404NIGON1500

October 29, 2012

Page 2

were created, produced and broadcast. That, however, was not the case. As the attached affidavit and letter of resignation clearly demonstrate, Mr. Cutler resigned from his position as a director of Americans Elect on June 26, 2012, before (based on Mr. Cutler's information and belief) Americans Elect had any discussions, took any actions, or made any decisions relating to the creation, production, distribution or payment for the TV ads or any other communications supporting Angus King's independent candidacy for U.S. Senate. Furthermore, as Mr. Cutler's affidavit states, he never engaged in any discussions of other activities that would constitute "coordination" under any of the conduct standards that the Commission applies under the "conduct prong" of its coordination regulations.

In the balance of this letter, I will (1) summarize the uncontroverted evidence that none of the Commission's conduct standards under the coordination regulation has been met, (2) show the absence of any evidence in the complaint to the contrary, and (3) demonstrate that Mr. Cutler has not engaged in any coordination between the King campaign and Americans Elect with respect to the TV ads at issue.

Request or Suggestion. The conduct prong of the Commission's coordination regulations is met if the person creating, producing, or distributing the communication does so at the request or suggestion of a candidate, authorized committee, or any agent thereof; or if the person paying for the communication suggests the creation, production, or distribution of the communication to the candidate, the candidate's authorized committee, or any agents thereof, and the candidate assents to the suggestion. See 11 C.F.R. §109.21(d)(1).

As the attached affidavit of Eliot Cutler makes clear, he has never suggested to anyone affiliated in any way with Americans Elect that the TV ads be created, produced or distributed. Mr. Cutler's affidavit also provides uncontroverted evidence that no one affiliated with Americans Elect has ever suggested the creation, production or distribution of the TV ads to Mr. Cutler and that Mr. Cutler never assented to such a suggestion on behalf of the King campaign. Furthermore, as one of nine volunteer and largely honorary statewide chairs of the King campaign, he has never been authorized to act as an agent of the King campaign for any such purposes. The only evidence in the complaint to the contrary is the allegation that Mr. Cutler was a director of Americans Elect during the period when the TV ads were created, produced and distributed. That allegation is based on a misunderstanding by Mr. Webster and is demonstrably false. As stated in Mr. Cutler's affidavit and demonstrated by the accompanying copy of his letter of resignation, Mr. Cutler resigned as a director of Americans Elect on June 26, 2012, before, to the best of Mr. Cutler's knowledge and belief, Americans Elect began discussions or made any decisions relating to the creation, production or distribution of the TV ads.

Material Involvement. The conduct prong of the Commission's coordination regulations is met if a candidate, authorized committee, or any agents thereof are "materially involved" in the decision-making regarding the (1) content of the communication; (2) intended audience; (3) means or mode of the communication; (4) specific media outlet used; (5) timing or frequency of

140476481

the communication; or (6) size or prominence of a printed communication or direction of a communication by means of broadcast, cable or satellite. *See* 11 C.F.R. §109.21(d)(2).

As shown by Mr. Cutler's affidavit he never had any discussions with anyone affiliated with Americans Elect about the TV ads, much less any of the six factors cited in the coordination regulations. Mr. Cutler never discussed with anyone affiliated with the King Campaign or Americans Elect the content, intended audience, means or mode of communication, specific media outlet used, timing or frequency, size, prominence or direction of the TV ads. Furthermore, as one of nine volunteer and largely honorary statewide chairs of the King campaign, Mr. Cutler was not authorized to act as the agent of the campaign with respect to the TV ads or any other communications supporting the King Campaign created, produced or distributed by Americans Elect. The only evidence to the contrary in the complaint is the allegation that Mr. Cutler was acting simultaneously as the chair of the King Campaign and as a director of Americans Elect, but, as stated above, that allegation was based on a misunderstanding by Mr. Webster and is demonstrably false.

Substantial Discussion. The conduct prong of the Commission's coordination regulation is met if a communication is created, produced, or distributed after one or more substantial discussions between the individual paying for the communication (or the person's agent) and the candidate or candidate's opponent (or the candidate's agents). A discussion is "substantial" if information about the plans, projects, activities or needs of the candidate that is material to the creation, production, or distribution of the communication is conveyed to the individual paying for the communication. *See* 11 C.F.R. §109.21(d)(3).

As demonstrated by Mr. Cutler's affidavit, he never had any discussions with, or otherwise conveyed information to, Americans Elect or anyone affiliated with Americans Elect that involved the plans, projects, activities or needs of the King Campaign or that was material to the creation, production or distribution of the TV ads. Again the only evidence to the contrary in the complaint is the allegation that Mr. Cutler was acting simultaneously as the chair of the King campaign and as a director of Americans Elect. As stated above, however, that allegation was based on a misunderstanding by Mr. Webster, and is demonstrably false.

In summary, there is no credible evidence to support the allegation in the Complaint that Mr. Cutler coordinated American Elect's TV ads with Angus King, the King Campaign or anyone affiliated with the King Campaign or that he ever assented to a suggestion by Americans Elect that the TV ads be created, produced or distributed either as an individual or as an agent of the King Campaign. None of the three standards under the conduct prong of the Commission's coordination regulations referred to in the Complaint has been met and the Complaint contains no credible evidence to the contrary.

For each and all of the foregoing reasons, I request, on behalf of Eliot R. Cutler, that no action be taken by the Commission in response to the Complaint. There is no reason to believe that a

14074106482

October 29, 2012

Page 4

violation of the campaign finance laws or the Commission's coordination regulation has occurred and the Complaint against Mr. Cutler should be dismissed.

Mr. Cutler waives the confidentiality provisions of 2 U.S.C. §437g(a)(4)(B) and §437g(a)(12)A with respect to this Response and wishes the matter to be made public by the FEC.

Respectfully submitted,



Richard A. Spencer  
Attorney for Eliot R. Cutler

RAS/kmr  
Enclosures

14044N6M4483



FEDERAL ELECTION COMMISSION  
999 E Street, NW  
Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL  
Please use one form for each Respondent/Entity/Treasurer  
FAX (202) 219-3923

MUR # 6660

NAME OF COUNSEL: Richard A. Spencer

FIRM: Drummond Woodsum

ADDRESS: 84 Marginal Way, Suite 600

Portland, ME 04101-2480

TELEPHONE- OFFICE (207 ) 772-1941

FAX (207 ) 772-3627

The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

10/25/12  
Date

[Signature]  
Respondent/Agent -Signature

Individual  
Title(Treasurer/Candidate/Owner)

NAMED RESPONDENT: Eliot R. Cutler

MAILING ADDRESS: \_\_\_\_\_  
(Please Print)

Cape Elizabeth, ME 04107

TELEPHONE- HOME ( \_\_\_\_\_ ) \_\_\_\_\_

BUSINESS ( 207 ) 415-6278

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation

Rev. 2010

14044363484